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In The Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The arguments presented in the Respondents' Brief in Opposition only confirm the need for this Court to grant certiorari. The Respondents wholly fail to address the conflicting standards applied to teacher expression among the Circuits, let alone the readily transparent gap between the Fourth Circuit's effective ban on all in-school teacher expression, and this Court's directly conflicting statements in *Morse v. Frederick*, 551 U.S. __, 127 S. Ct. 2618 (2007), and *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393

U.S. 503 (1969), that teachers do not shed their rights to free expression at the schoolhouse gate.

I. RESPONDENTS HAVE FAILED TO JUSTIFY THE FOURTH CIRCUIT'S EFFECTIVE BAN ON IN-SCHOOL TEACHER EXPRESSION.

Avoiding the myriad and conflicting standards applied to teacher expression among the Circuits, Respondents simply argue that the Fourth Circuit had it right, i.e., anytime a teacher seeks to "impart knowledge" to students, the communication is "curricular" in nature and unprotected by the First Amendment. But this standard means that literally *any*, and *all*, teacher communication is subject to unrestrained censorship, retaliation or punishment at the whim of school officials, notwithstanding governmental policies to the contrary. The argument flies in the face of statements in *Morse* and *Tinker* that teachers do not shed their constitutional rights or freedom of expression at the schoolhouse gate. *Morse*, 127 S. Ct. at 2625; *Tinker*, 393 U.S. at 506. It also conflicts with standards applied in other Circuits. See cases cited in Petition for Certiorari, pp. 17-18. And it contravenes established precedent against viewpoint discrimination when governmental policies expressly permit speech. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995).

Seeking further to avoid substantive concerns, Respondents advance the hyperbolic argument that Lee seeks the right "to post any materials he wishes on the classroom bulletin boards[.]" (A-14). This simply is not true. The claims made in the Complaint in this case relate solely to the materials removed by Principal Zanca; at no time did Lee seek relief barring school officials from interfering with any and all postings in his classroom, nor does he now. JA 17. The Complaint, and the arguments advanced during the litigation, were limited to seeking a determination that the removal of *these materials* constituted viewpoint discrimination. A decision favoring Lee in this case would not grant teachers *carte blanche* to post materials in their classroom but would simply recognize that when schools, as in this case, have a policy, practice and custom of allowing teacher expression, that expression may not be subjected to impermissible viewpoint discrimination.

Respondents also tender the preposterous argument that because Lee personally liked the postings, his expression does not relate to a "matter of public concern" under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). (Brief in Opposition at 8). This distinction is blind to common sense and otherwise is without precedent. There is no valid reason, and certainly no precedent, holding that a "matter of public concern" cannot concurrently be a matter of "personal" interest for purposes of *Pickering* and

Connick. Indeed, it would be the rare and unusual person who would engage in expression on matters of public concern without having some personal interest in those matters. The Court of Appeals specifically recognized that but for the sweeping "curricular" speech test it applied, Lee's contention that his postings related to matters of public concern would "normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern." (A-15).

II. BY ADOPTING A POLICY, PRACTICE AND CUSTOM PERMITTING TEACHER EXPRESSION, RESPONDENTS HAVE CREATED, AT THE VERY LEAST, A *TINKER* FORUM IN WHICH VIEWPOINT DISCRIMINATION IS PROSCRIBED.

Respondents' contention that no forum for expression existed at Tabb High School is directly contradicted by Superintendent Staples' admission that the school system had a policy permitting teachers to place things on their bulletin boards and walls that are of personal interest and aren't necessarily curriculum-related. JA 258.[1] Indeed, the Court of Appeals acknowledged that there is an

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[1] Superintendent Staples was the Respondents' Fed. R. Civ. P. 30(b)(6) designee.

applicable unwritten policy, custom, and practice for York County teachers authorizing teachers to place materials on bulletin boards that are of personal interest. (A-5). Respondents' suggestion, therefore, that there was no "forum" because only teachers were allowed to engage in expression on bulletin boards is terminally flawed. Clearly, "[a] public forum may be created for a limited purpose *such as use by certain groups*[.]" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n. 7 (1983) (emphasis added). Likewise, assuming that a teacher's classroom wall or bulletin board is at least a venue in which the principles of *Tinker* would apply in light of a school policy permitting expression, the school was not at liberty to engage in viewpoint discrimination in that venue. *Id.*, 460 U.S. at 55; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001); *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).[2]

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[2] Contrary to Respondents' suggestion, the ruling below is not supported by *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). *Downs* held that material a teacher posted on the bulletin board could be removed by school officials because the facts showed that the bulletin board was reserved for "government speech" promoting the school district's policies on diversity and tolerance. The teacher was not entitled under the First Amendment to post materials in a place designated for government speech materials that were in opposition to the school district's policies. *Downs*, 228 F.3d at 1012. In the instant case, the classroom walls were not restricted to "government speech" and the admitted policy allowed Lee and other teachers to post materials of personal interest unrelated to the

III. LEE'S POSTINGS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Respondents claim that the Establishment Clause automatically trumps whatever First Amendment rights Lee may have in the classroom because a religious topic is involved. This argument cannot withstand scrutiny. First, Principal Zanca confirmed – by leaving up images of children praying and a poster charging students to "Pray for America" – that even the display of materials with an overt religious content did *not* constitute an endorsement or establishment of religion. Moreover, the materials Lee displayed were of a diverse nature, with a highly varied content. See Petition for Certiorari, pp. 7-8, and n. 3. All of the items posted were presented in a predominantly societal and secular (and/or historical) context, with some that included religious subject matter. The postings were wholly passive in nature. None contained explicitly (or even implicitly) doctrinaire or sectarian proclamations such as the Ten Commandments. Because they appeared in the overall context of other teachers posting different materials on their classroom walls, with only Lee posting these particular materials, they were very clearly Lee's own postings and did not suggest the imprimatur of the school. High school students are

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curriculum. (A-5). Significantly, the Court of Appeals did not rely upon or even cite the *Downs* case.

mature enough to understand that a school does not endorse or support speech that it permits on a nondiscriminatory basis. *Bender v. Williamsport Area School District*, 475 U.S. 534, 556 (1986) (Powell, J., dissenting); *Westside School District v. Mergens*, 493 U.S. 336, 350 (1990).

The fact that a few of Lee's materials included "religious" topics does not condemn them as inherently sectarian or proselytizing. Indeed, if "obviously religious content" required censorship, the inclusion of religion directly in a public school curriculum would even more so be proscribed. But, as Mr. Justice Brennan observed over fifty years ago in a case outlawing daily Bible reading in the classroom:

> The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion".... Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers.

School District of Abington Township v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring). The dangers Justice Brennan warned of are

exemplified in Principal Zanca's indiscriminate removal of the materials from Lee's classroom, particularly in light of the school's policy permitting teachers to display non-curricular materials of personal interest.

The Respondents also fail to present anything in the record suggesting that Lee sought to use the censored materials to proselytize or exhort religious observance, or that he intended to endorse religion. The removed materials related to secular events with a religious angle. Three of the removed items were news articles by independent newspapers and news services that simply reported upon secular events having a religious content. A fourth provided additional local background information on one of the newspaper reports. None of the materials required or coerced any high school student to support or participate in religious activities or exercises. Nor did the materials proselytize on behalf of a particular religion or endorse religion generally. They simply related information on subjects otherwise permitted for display or discussion in the classroom. Absent a showing that the content of the materials proselytized or endorsed religion, or that Lee sought to do so, the decisions in *Rosenberger*, *Perry*, *Lamb's Chapel*, and *Good News* prohibit censorship solely because of religious content, particularly when, as in this case, (1) religious content of equal degree was permitted to be displayed, and (2) the school had a policy permitting teachers to display non-curricular materials of personal interest. *Good News Club*, 533

U.S. at 114; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 394; *Perry*, 460 U.S. at 46.[3]

Respondents seek to impugn Lee's motivation in posting the materials, contending that he did so "to demonstrate his own *personal* and deeply held religious faith, and his desire to witness that faith to his students." (Brief in Opposition at 10). This is a complete distortion of the record. Lee's deposition testimony was precisely to the contrary:

> Q. Do you believe that you should share your personal religious beliefs with the children in your classroom?
>
> A. You could be borderline offensive if you think I am so stupid, I know you're not calling me stupid, I don't think you are—

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[3] Even if, as Respondents argue, Lee's expression was school-sponsored speech, most Courts of Appeals addressing the issue have held, contrary to Respondents' position, that schools may not engage in viewpoint discrimination as to school-sponsored speech. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc); *Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989); *Contra Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002).

> Q. I'm not.
>
> A. --as to endorse a religion in my classroom. I know that it's illegal. I don't know a licensed teacher who thinks otherwise.

JA 97-98.

Lee was also asked about an item that Zanca removed from his walls, and this exchange occurred:

> Q. . . . . You have a deep seated personal faith or belief, correct?
>
> A. Yes, I do.
>
> Q. And, if I hear you correctly, you find this uplifting because it reflects your personal faith.
>
> A. I certainly did not say anything like that. *If you'll take a look at that it doesn't reflect the detail of my faith at all. It doesn't endorse, it doesn't invite a kid to worship.*

JA 52 (emphasis added). Thereafter, the following exchange took place:

> Q. And is it your testimony that at least part of the reason for you

> including [the removed materials], is not to convey your pride in being a member of a deep seated religious belief?
>
> A. Like you say, we could dance all you want to, *but I didn't put those things up to endorse my faith.* They're interesting to me and I find no reason, including at this moment, to be ashamed of it, relative to all of the others.

JA 77 (emphasis added).

Far from Lee seeking to proselytize, it was Principal Zanca's decision to leave up images of children praying and a poster charging observers to "Pray for America" that represents the gravamen of the error in this case. In doing so, Zanca engaged in standardless thought policing by, on the one hand, censoring materials based on their "obviously religious content" but, on the other hand, permitting the display of materials (with equally obvious religious content) based on his own personal predilections and worries over the viewpoint of the military community whose children populated the schools. In light of an affirmative school policy, practice, and custom permitting teachers to post non-curricular materials of personal interest on classroom walls, the distinctions drawn by Principal Zanca were

arbitrary, unreasonable, and discriminatory and cannot be justified under the Establishment Clause.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari.

Date: September 25, 2007.

Respectfully submitted,

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